

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BECKLEY DIVISION**

BRIAN FANARY,

Petitioner,

v.

CIVIL ACTION NO. 5:11-cv-00668  
(Criminal No. 5:10-cr-00003)

UNITED STATES OF AMERICA,

Respondent.

**MEMORANDUM OPINION AND ORDER  
ADOPTING PROPOSED FINDINGS AND RECOMMENDATION**

The Court has reviewed Petitioner's September 27, 2011 *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (Document No. 78), wherein he raises several allegations that he received ineffective assistance of counsel by both his trial and appellate counsel. By *Standing Order* (Document No. 80) entered on September 27, 2011, this action was referred to the Honorable R. Clarke VanDervort, United States Magistrate Judge, for submission to this Court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636.

On September 29, 2011, the Magistrate Judge submitted *Proposed Findings and Recommendation* (Document No. 82) wherein he found that Petitioner has a direct appeal of his conviction and sentence currently pending before the Court of Appeals for the Fourth Circuit, and that he fails, in his Section 2255 Motion, to present extraordinary circumstances compelling this Court to consider his Section 2255 Motion during the pendency of that direct appeal. The Magistrate Judge found the instant motion to be premature. As a result, Magistrate Judge

VanDervort recommended that this Court dismiss Petitioner's Motion without prejudice and remove this matter from the Court's docket.

Magistrate Judge VanDervort advised the parties that any objections to the PF&R were due seventeen days from the date of the filing of his PF&R, or on October 17, 2011. To date, neither party has filed any objections to the Magistrate Judge's *Proposed Findings and Recommendation*. The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review and the Petitioner's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); *see also Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984).

Accordingly, the Court **ADOPTS** and incorporates herein the findings and recommendation of the Magistrate Judge as contained in the *Proposed Findings and Recommendation*, and **ORDERS** that Petitioner's Motion (Document 78) be **DENIED** and this matter **DISMISSED WITHOUT PREJUDICE** and **REMOVED** from the Court's docket.

The Court has additionally considered whether to grant a certificate of appealability. *See* 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this Court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). The Court concludes that the governing standard is not satisfied in this instance. Accordingly, the Court **DENIES** a certificate of appealability.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge VanDervort, counsel of record, and any unrepresented party.

ENTER:        October 24, 2011



IRENE C. BERGER  
UNITED STATES DISTRICT JUDGE  
SOUTHERN DISTRICT OF WEST VIRGINIA